No. 9553

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH GOLDIE,

Appellant,

vs.

STERLING CARR, Receiver of Estate of Herbert Fleishhacker, Debtor,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS

On September 29, 1937 a written contract was entered into by and between Joseph Goldie, appellant herein, and Herbert Fleishhacker (Tr. pp. 8-12) whereby the said Joseph Goldie admitted that Herbert Fleishhacker was entitled to receive from him three thousand (3,000) shares of Class "A" common stock of Rainier Brewing Company, Inc., a corporation (Tr. p. 8), and further agreed, within a period of two years

from September 29, 1937, to deliver to Herbert Fleishhacker said 3,000 shares of Rainier Class "A" common stock or its equivalent (Tr. pp. 9, 10 and 11).

The contract further provided that, in order to assure Herbert Fleishhacker of the ultimate delivery to him of said 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc., Joseph Goldie agreed to pledge to Herbert Fleishhacker five hundred thirty-nine (539) shares of Class "A" 7% Cumulative Preferred stock of Pacific Products, Inc., a corporation (Tr. pp. 8 and 9).

The contract further provided that during the life of said agreement Herbert Fleishhacker should have paid to him all dividends declared and paid upon said 539 shares of Pacific Products, Inc. arising from dividends received by said Pacific Products, Inc. upon stock of Rainier Brewing Company, Inc. held by it, to the extent that Herbert Fleishhacker would receive were he the owner of 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc.

This agreement was drawn by Charles M. Stark, attorney for Joseph Goldie, the appellant herein (Tr. pp. 62 and 63).

After the execution of this agreement Joseph Goldie refused to deliver to Herbert Fleishhacker said 539 shares of Pacific Products, Inc. Class "A" 7% Cumulative stock as security under the terms of said agreement, or, in lieu thereof, 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc. (Tr. p. 29).

On September 20, 1938 Joseph Goldie delivered to Herbert Fleishhacker the sum of one thousand eight hundred (1,800) dollars, this being a dividend of sixty cents per share on the 3,000 shares of Class "A" common stock of Rainier Brewing Company, Inc. mentioned in the agreement (Tr. p. 29). On said 3,000 shares Joseph Goldie received the following dividends: October 21, 1937 $1.30 per share; November 20, 1937 15¢ per share; September 16, 1938 60¢ per share; October 24, 1938 $1.15 per share. On December 29, 1938 Rainier Brewing Company, Inc. declared an additional dividend of 60¢ per share on said 3,000 shares of stock, payable at the rate of 20¢ per share on January 10, 1939, February 10, 1939 and March 10, 1939. All of such dividend payments were received by Joseph Goldie, but none of them was turned over to Herbert Fleishhacker save and except the said sum of $1,800 (Tr. pp. 29 and 30). At no time did Joseph Goldie advise Herbert Fleishhacker that it was not his intention to pay him these dividends; on the contrary, every time a dividend was paid, Joseph Goldie affirmed his intention to make the payments to Herbert Fleishhacker (Tr. pp. 32 to 34).

Joseph Goldie claimed an offset of one thousand three hundred ninety-four and 94/100 (1,394.94) dollars against these dividends (see Receiver's Exhibit No. 2, Tr. p. 37). This alleged offset of $1,394.94 claimed by Joseph Goldie to be due from Herbert Fleishhacker was based upon the following: (a) the sum of one thousand one hundred nineteen and 94/100 (1,119.94) dollars due the Edward J. Goldie Importation Com-

pany, a corporation, which claim of said corporation was never assigned to Joseph Goldie (Tr. pp. 48 to 51); (b) Joseph Goldie claimed that the two hundred eighty (280) dollars constituting the balance of said total claimed offset of $1,394.94 was owed to him by Herbert Fleishhacker, but that he did not recall what it was for (Tr. p. 57).

On November 23, 1938 Herbert Fleishhacker filed his petition under Chap. XI of the National Bankruptcy Act in the United States District Court at San Francisco, California. Thereafter, and on January 26, 1939 Sterling Carr was appointed Receiver for the estate of Herbert Fleishhacker, Debtor (Tr. pp. 1 and 2).

On April 3, 1939 Sterling Carr, as such Receiver, filed a petition for summary order directed to Joseph Goldie to turn over to the Receiver the 539 shares of Class A 7% Cumulative Preferred stock of Pacific Products, Inc. in accordance with the provisions of said agreement of September 29, 1937, together with the dividends due Herbert Fleishhacker on the 3,000 shares of Class A common stock of Rainier Brewing Company, Inc. in the sum of nine thousand six hundred (9,600.00) dollars (Tr. pp. 1 to 12).

On April 13, 1939 Joseph Goldie filed his verified plea objecting to the summary jurisdiction of the Bankruptcy Court to hear and determine the matter. This plea contained allegations which questioned the validity of the agreement of September 29, 1937 (Tr. pp. 16 to 21).

On May 5, 1939, after a hearing before the Referee on the question of the summary jurisdiction of the Bankruptcy Court, the plea of Joseph Goldie was overruled and he was directed within five days to file his answer on the merits (Tr. pp. 76 to 78).

At no time did Joseph Goldie file his answer as directed by the Referee's order.

Thereafter and on May 12, 1939 Joseph Goldie filed his petition to review the order of the Referee overruling his objections to the jurisdiction of the Bankruptcy Court to proceed summarily (Tr. pp. 78 to 83).

On January 25, 1940 the certificate and report of the Referee on the petition to review was filed with the District Court (Tr. pp. 83 to 162).

On April 26, 1940 the United States District Court made its order affirming and adopting the order of the Referee, in which it was "ordered, adjudged and decreed that the objection of the respondent, Joseph Goldie, to the jurisdiction of this court to proceed summarily upon the Receiver's petition and order to show cause, be, and it is, overruled" (Tr. p. 163).

From that order Joseph Goldie takes this appeal.

QUESTIONS INVOLVED

The questions involved in this appeal are as follows:

1. Has the United States Circuit Court of Appeals for the Ninth Circuit jurisdiction to entertain an appeal from an interlocutory order made in

a controversy arising in proceedings in bankruptcy?

2. Has the Bankruptcy Court the right to proceed summarily against the appellant, Joseph Goldie, who has challenged the court's jurisdiction so to do?

ARGUMENT

I.

THE ORDER OF THE UNITED STATES DISTRICT COURT FROM WHICH THE APPEAL IS SOUGHT TO BE TAKEN IS AN INTERLOCUTORY ORDER MADE IN A CONTROVERSY ARISING IN PROCEEDINGS IN BANKRUPTCY, AND THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HAS NO JURISDICTION TO ENTERTAIN SUCH AN APPEAL.

Prior to the preparation and filing of this brief, the appellee Sterling Carr as Receiver for the estate of Herbert Fleishhacker, Debtor, filed a motion to dismiss the appeal of the appellant herein, and this brief is filed without prejudice to the right of the appellee to have said motion to dismiss determined by this court. Such motion to dismiss was filed on August 13, 1940 and had not been determined prior to the filing of this brief. Therefore, the appellee again urges said motion and incorporates the same as part of this brief.

Counsel for appellant have stated on page 2 of their brief that the appeal was taken from the order dated April 26, 1940 made by the District Court (Tr. p. 163)

sustaining the order of the Referee overruling appellant's objections to the jurisdiction of that court to proceed summarily against him.

Counsel also set forth on page 2 of their brief that the jurisdiction of the Circuit Court of Appeals is found in the provisions of Secs. 24a and 24b of the Bankruptcy Act. This is a correct statement of the order appealed from, and of the sections of the Bankruptcy Act in which the jurisdiction of the appellate court is stated.

The order of the District Court sustaining the order of the Referee overruling appellant's objection to the jurisdiction of the Bankruptcy Court to proceed summarily against Joseph Goldie, the appellant, is an interlocutory order made in a controversy arising in proceedings in bankruptcy.

Pearson v. Higgins, 34 Fed. (2d) 27;
In re Federal Photoengraving Corporation, 54 Fed. Rep. (2d) 628, at 629;
Lieberman v. Bancroft, 69 Fed. Rep. (2d) 202, at 205 and 206;
Hoehn v. McIntosh, 42 A. B. R. (n.s.) 475, at 481; 110 Fed. (2d) 199, at 201;
Bank of America N. T. S. A. v. Cuccia (9th C. C. A.), 93 Fed. (2d) 754, at 758.

We submit, under the authority of these cases, that the court, not having jurisdiction to hear this appeal, should grant the motion to dismiss.

II.

BY REASON OF THE FORM AND SUBSTANCE OF GOLDIE'S WRITTEN OBJECTIONS TO THE COURT'S JURISDICTION, HE HAS WAIVED ANY OBJECTION TO THE JURISDICTION OF THE BANKRUPTCY COURT AND WAS AND NOW IS BEFORE SAID COURT BY A GENERAL APPEARANCE AND FOR ALL PURPOSES:

From an examination of the allegations of said verified objections (Tr. pp. 14 to 21) we find that certain allegations are set out which constitute an answer on the merits, and the court must therefore disregard any objections to the jurisdiction. The allegation set forth in said return which stated *"That upon the refusal of said Anglo California National Bank to deliver to Herbert Fleishhacker three thousand shares Rainier Brewing Company stock referred to hereinabove, the agreement of September 29, 1937 became inoperative and of no force and effect"* (Tr. p. 19) denied that there was a contract in existence between Joseph Goldie and Herbert Fleishhacker. There is no doubt but that these allegations are an answer to the merits and any objection made to the jurisdiction is waived, because they place before the court the question of the validity of the contract and the rights of Herbert Fleishhacker or his Receiver to recover from Joseph Goldie.

The general rule is that a respondent appearing generally and answering on grounds going to the merits of the controversy (the merits of the contract in this case) as well as the jurisdiction of the court,

waives the objection that the court is without jurisdiction of the person or the subject matter.

Collier on Bankruptcy (3d ed.) p. 463.

"It is elementary law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction, and put the defendant to his defense."

In re Kornit Mfg. Co., 192 Fed. 392, at 395.

This rule is also followed by the United States Supreme Court:

"It is true that where the defendant appears by motion and objects to the jurisdiction and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in St. Louis & S. F. Ry. Co. vs. McBride, 141 U. S. 127, where a demurrer was interposed raising two grounds of jurisdiction and the third going to the merits of the cause of action, and it was held that there had been a submission to the jurisdiction of the court. See also Western Loan Co. vs. Butte & Boston Min. Co., 210 U. S. 368."

Big Vein Co. v. Reed, 229 U. S. 31, at 38, 33 S. Ct. 694, at 696.

" 'If the appearance is a general one, the fact that it is expressly limited by its terms as special does not prevent it from being general, as all

appearances are presumed to be general.' 2 Ruling Case Law, 328.

" 'Whether an appearance is general or special does not depend on the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not.' Dailey Motor Co. v. Reaves, 184 N. C. 260, 114 S. E. 175, 176.

" 'Broadly stated, any action on the part of a defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance.' 4 Corpus Juris, 1333.

" 'There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.' Merchants' Heat & Light Co. v. James B. Clow &

Sons, 204 U. S. 286, 27 S. Ct. 285, 286, 51 L. Ed. 488."

Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co., 37 Fed. Rep. (2d) 695, at 701.

See also

St. Louis & S. F. Ry. Co. v. McBride, 141 U. S. 127, at 130; 35 L. Ed. 659, at 661:

"Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

III.

BY CALLING WITNESSES AND SUBJECTING THEM TO ORAL EXAMINATION ON HIS BEHALF, JOSEPH GOLDIE WAIVED ANY OBJECTION TO THE JURISDICTION OF THE BANKRUPTCY COURT, AND HE IS NOW BEFORE SAID COURT FOR ALL PURPOSES:

After the attorneys for the Receiver had submitted their case to the Referee, and before a ruling was made by the Referee on the question of jurisdiction, Joseph Goldie through his attorneys called Leon Sloss Jr. and Harry T. Thompson to the stand as his witnesses and subjected them to oral examination. By the examination of Mr. Sloss, who was a Vice-President of the Anglo California National Bank, by the attorneys for Mr. Goldie, the validity of the contract involved in this matter was questioned. In other words, the purpose of the examination was to show that the contract became void and of no effect when the Pacific Products Inc. stock, which was in the possession of said Anglo California Bank could not be transferred (Tr. pp. 60 to 70).

Also, the examination of Harry T. Thompson, an employee of said Anglo California Bank, sought to show that Mr. Fleishhacker never made any effort to obtain the stock of Pacific Products Inc. standing in the name of Joseph Goldie on pledge to the Bank. In addition, in his examination the attorney for Goldie attempted to show that Mr. Fleishhacker owed money to Joseph Goldie (Tr. pp. 65 to 70).

The calling of these witnesses and subjecting them to an examination on behalf of Joseph Goldie raised

a question which asked for relief, that could only be granted on the hypothesis that the court had jurisdiction of Joseph Goldie, and therefore his appearance must be general although there is an attempt to term it "special".

> "Participation in the trial of a cause of action by examining and cross-examining witnesses therein amounts to a general appearance, and is a waiver of process."
>
> *Miller v. Prout,* 33 Idaho 709, at 713; 197 Pac. 1023, at 1024;

See also:

> *Pittenger v. Al G. Barnes Circus,* 39 Idaho 807, at 811; 230 Pac. 1011;
>
> *Poage v. Cooperative Pub. Co.,* 57 Idaho 561, at 574; 66 Pac. (2d) 1119, at 1125.

> "It is well settled that if a party defendant raises any question other than that of jurisdiction or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. (Security Loan & Trust Co. v. Boston & South Riverside Fruit Co., 126 Cal. 418 (58 Pac. 941, 59 Pac. 296); Olcese v. Justice's Court, 156 Cal. 82 (103 Pac. 317).)
>
> "If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially

appear for that purpose only, and must keep out for all other purposes except to make that objection. (Taylor v. Superior Court, 93 Cal. App. 445 (269 Pac. 727).)"

Burroughs v. Burroughs, 10 Cal. App. (2d) 750.

The purpose of counsel for appellant in examining these witnesses was an attempt to introduce parol evidence which, if allowed, would vary the terms of a written instrument. This oral testimony was directed to the validity of the contract in question. This being so, a general appearance was made on behalf of Joseph Goldie and any objection to the jurisdiction of the Referee to determine the controversy was waived.

IV.

AT THE TIME HERBERT FLEISHHACKER FILED HIS PETITION UNDER CHAPTER XI, AND ALSO AT THE TIME OF THE FILING OF THE PETITION BY THE RECEIVER FOR A SUMMARY ORDER, JOSEPH GOLDIE WAS AND NOW IS ACTING AS A TRUSTEE OF THE DEBTOR HERBERT FLEISHHACKER:

The agreement provided that Joseph Goldie was to deliver 539 shares of Pacific Products Inc. Class A preferred stock to Herbert Fleishhacker to hold as security for an obligation on the part of Goldie for the delivery of 3,000 shares Rainier Brewing Company stock. The agreement further provided that until Joseph Goldie secured said 3,000 shares of Rainier Brewing Company stock, he was to pay over

to Herbert Fleishhacker any dividends declared upon the 3,000 shares after they had been paid.

"Mr. Glicksberg: Q. Mr. Goldie, at the time when you executed this agreement, you were the owner of 1,924.4 shares of class A, 7 per cent cumulative preferred stock of Pacific Products, Inc.?

The Witness: A. I believe so, yes.

Q. Did you at any time deliver to Herbert Fleishhacker 539 shares of Pacific Products, Inc., a corporation, class A, 7 per cent cumulative stock? A. No, sir.

Q. As per the terms of this agreement?

A. No, sir.

Q. At no time have you delivered said stock since September 29, 1937, to the present time?

A. No, sir.

Q. Since September 29, 1937, did you deliver any dividends to Mr. Fleishhacker?

A. I believe I did.

Q. And when? A. I haven't the dates.

Mr. Stark: Did you say since?

Mr. Glicksberg: Yes.

Mr. Stark: In order to save the court's time, I am willing to stipulate that only one delivery of money has been made by Mr. Goldie following the date of the contract, to Mr. Fleishhacker, which delivery was the sum of $1,800 on September 20, 1938.

Mr. Glicksberg: Q. That sum of $1,800 was delivered on account of dividends due to Mr. Fleishhacker?

The Witness: A. Yes, sir.

Q. Mr. Goldie, on the 3,000 shares of Rainier Brewing Company class A stock set forth in the

agreement you received from the Rainier Corporation on October 21, 1937, $1.30 per share dividend, did you not.

A. I believe we did. I am not sure, but I think we did.

Q. November 20, 1937, you received a further dividend of 15 cents on the Rainier Class A stock?

A. I think so.

Q. September 16, 1938, you received 60 cents a share dividend, which evidently has been paid by this $1,800 you testified to? A. Yes.

Q. On October 24, 1938, a further dividend was declared and paid by Rainier Brewing Company in the sum of $1.15? A. Yes.

Q. On each and every one of the class A Rainier shares? A. I think so.

Q. On December 29, 1938, the Rainier Brewing Company further declared an additional dividend of 60 cents, which was payable at the rate of 20 cents per share on the 10th of January, 1939, the 10th of February, 1939, and the 10th of March, 1939? A. That is correct.

Q. All of those dividends were received by you? A. Yes.

Q. And all the dividends were also received by you of the 3,000 shares of stock due to Mr. Herbert Fleishhacker? A. Yes." (Tr. pp. 28 to 30).

* * * * * * *

"Mr. Glicksberg: Q. Did you at any time between the 29th of September, 1937, and the present date inform Mr. Fleishhacker that you were indebted to Mr. Fleishhacker for the dividends set forth?

THE WITNESS: A. I believe so."

* * * * * * *

"Q. May I repeat the question, Mr. Goldie: Did you at any time have any discussion with Mr. Fleishhacker referring to the question of dividends, your failure to make payment?

A. Yes, we talked about it every time a dividend was paid.

Q. You mean you talked to Mr. Fleishhacker about October 21, 1937, about the dividend?

A. I don't remember the date exactly when I talked to him, but I presume every time there was a dividend, we talked to each other about it.

Q. Did you at any time in these conversations tell Mr. Fleishhacker that you were not going to pay those dividends to Mr. Fleishhacker?

A. No, no.

Q. Is it not a fact that every time you have affirmed your intention to make these payments to Mr. Fleishhacker? A. Yes, sir.

Q. Is it not also a matter of fact that you communicated with Mr. Fleishhacker and told him that you were indebted to Mr. Fleishhacker for these various dividend payments to you?

MR. STARK: Just a minute. Are you referring to a written communication now, Mr. Glicksberg?

MR. GLICKSBERG: I am asking; that is up to the witness.

THE WITNESS: A. I don't believe there ever was any written communication; it was all verbal.

Q. All verbal? A. Yes." (Tr. pp. 31 to 33).

This testimony on the part of Joseph Goldie shows that he was holding dividends which belonged and

were due to Mr. Fleishhacker under the terms of the contract. One of the fundamental rules of law is that every person who receives money to be paid to another, or to be applied to a particular purpose, is a trustee.

Woodmansee v. Schmitz, 232 N.W. 774 at 775; 202 Wis. 242 at 246.

Property in the hands of a trustee of the Debtor under the protection of the Bankruptcy Act is constructively in the possession of such Debtor, hence is subject to the summary jurisdiction of the court.

> "By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either Section 67e or Section 60b, or Section 70e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee; where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; *where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed,*

the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

Taubel v. Fox, 264 U. S. 426, at 432-3; 44 S. Ct. 396 at 398 and 399.

"But property held or acquired by others for account of the bankrupt is subject to a summary order of the court which may direct an accounting and the payment over to the trustee or receiver appointed by the Bankruptcy Court."

May v. Henderson, 268 U. S. 111, at 115; 45 S. Ct. 456, at 458.

With the unqualified admission by Joseph Goldie that these dividends belonged to Herbert Fleishhacker, and that he always advised Herbert Fleishhacker that they belonged to him, the Bankruptcy Court would be helpless indeed if it did not have power to compel Joseph Goldie to turn over these dividends, after he admitted that they rightfully belonged to Herbert Fleishhacker.

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of someone for him, on petition and rule to show cause? *Does a mere refusal by the bankrupt or his agent so to deliver up oblige*

the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be?

"If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

* * * * * * *

"The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent."

Mueller v. Nugent, 184 U. S. 1, at 14, 15.

See also:

Chicago Board of Trade v. Johnson, 264 U. S. 1; 44 S. Ct. 232.

Also, the Federal Courts have held that a debt due a bankrupt estate is so far constructively in the trustee's possession as to give the Bankruptcy Court jurisdiction to determine the rights of the parties to it.

Orinoco Iron Co. v. Metzel, 230 Fed. 40, at 45; *In Re Ransford,* 194 Fed. 654, at 658.

Indeed, it would be a strange situation if the Referee in Bankruptcy sitting as a Judge of the Bankruptcy Court, could not order Joseph Goldie to turn over dividends to the Receiver or Herbert Fleishhacker, when in his own testimony he admits that he owes the dividends in question to Herbert Fleishhacker.

V.

THE ALLEGED ADVERSE CLAIM OF GOLDIE IS UNSUBSTANTIAL AND OBVIOUSLY WITHOUT COLOR OF MERIT, AND IS A MERE PRETENSE, AND THE REFEREE SHOULD PROCEED IN A SUMMARY MANNER AND ADJUDICATE THE MATTER IN FAVOR OF THE RECEIVER:

Counsel for appellant in his brief has set out several cases holding that the Bankruptcy Court has no jurisdiction to proceed in a summary manner if the adverse claim is real and substantial. We have no quarrel with the principle laid down by these cases, but wish to call the court's attention to the fact that such cases go further and state that if the so-called adverse claim is merely colorable, the court may then proceed to adjudicate the merits summarily.

The cases cited do not give a clear definition of the test to be applied in determining whether an adverse claim is substantial, or merely colorable. At this time we wish to call the court's attention to a quotation from a leading case on this point, decided by the

U. S. Supreme Court and which very clearly defines this illusive proposition:

> *Harrison v. Chamberlin,* 271 U. S. 191, at 194; 46 S. Ct. 467:
>
> "Without entering upon a discussion of various cases in the Circuit Courts of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of the opinion it is to be deemed of a substantial character when the claimant's contention *'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy',* (citing *Board of Education v. Leary,* 236 Fed. 521 at 524), in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously without color of merit, and a mere pretense."

The evidence adduced at the hearing before the Referee showed two things that in our opinion conclusively indicate that the alleged adverse claim of Goldie is merely colorable and is made in bad faith and without any legal justification; viz. (a) Goldie admits that he entered into the contract with Herbert Fleishhacker and agreed to deliver to him 539 shares of Pacific Products Inc. Class A 7% cumulative stock; the contract further shows that Goldie agreed to pay to Herbert Fleishhacker the dividends declared on 3,000 shares Rainier Brewing Company Class A stock. Goldie further testified that pursuant to that contract,

he received all of the dividends claimed by the Receiver on behalf of the Debtor on the 3,000 shares due to Herbert Fleishhacker (Tr. p. 30). (b) He also admitted paying to the Debtor $1,800 on account of those dividends. If that testimony is not sufficient to show that his adverse claim is merely colorable, we only have to call the court's attention to Receiver's Exhibit No. 2, which is a letter written by Joseph Goldie to the Debtor, Herbert Fleishhacker, on September 20, 1938, where he admits in writing that the dividends on the stock are due to Mr. Fleishhacker.

With this evidence in mind, two things must be admitted. *First,* the execution of the contract by Mr. Goldie, which was prepared by his own attorney, Mr. Stark, and *second,* the payment of certain moneys on account of the dividends required to be paid under this contract. If the contract is valid for one purpose, it is valid for all purposes, and Goldie without question is bound to pay to the Debtor the dividends on the 3,000 shares when the same are paid to him by the Rainier Brewing Company.

These undisputed facts show that Goldie's refusal to turn over to the Receiver the dividends received by him on the said 3,000 shares, is without merit and brings this proceeding within the rule laid down in the case of

Marcell v. Engebretson, 74 Fed. (2d) 93, at 97:

> "The court is not ousted of its jurisdiction by the mere assertion of any adverse claim; but, having the power in the first instance to deter-

> mine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. *And if found to be merely colorable the court may then proceed to adjudicate the merits summarily;* but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceedings." (Citing cases.)

Goldie admits that he owes the money to Fleishhacker which is represented by the dividends paid to him on the 3,000 shares of stock, and therefore under the case of

Orinoco Iron Co. v. Metzel, supra,

the court has summary jurisdiction in this matter, because a debt due the bankrupt estate is so far constructively in the trustee's possession as to give the Bankruptcy Court jurisdiction to determine the rights of the parties to it. Opposing counsel attempt to escape the rule laid down in the *Orinoco Iron* case by contending that Goldie has a legitimate offset to the claim for dividends, in the sum of $1,394.94 and that therefore a real dispute exists between Joseph Goldie and Herbert Fleishhacker. The testimony of Goldie on the hearing does not substantiate this contention, for the evidence shows a debt not in favor of Mr. Goldie in the sum of $1,119.94 but in favor of the Edward J. Goldie Importation Company, a corporation, and a separate and distinct entity. This attempt to show a real dispute fell flat when Mr. Goldie upon examination by Mr. Glicksberg showed that the Edward J.

Goldie Importation Company was a corporation and that said corporation did not at any time assign its claim to Mr. Goldie (Tr. pp. 50 and 51).

As to the balance of the $1,394.94, viz. "$275 or $300", Mr. Goldie attempted to testify that it arose as far back as 1933 or 1934; what it was for, he did not recall. See Tr. p. 48, which contains the following testimony of Joseph Goldie:

> "Mr. Glicksberg: Q. Mr. Goldie, with reference to this offset of $1,394.94, what was that due to you from Mr. Fleishhacker for?
>
> A. That was due me in a settlement for some cash money that he owed to the Edward J. Goldie Importation Company, which I took over.
>
> Q. When was this settlement had?
>
> A. That was just part of it and the other was something else. I don't recall, $275 or $300. I haven't the other item. This went back as far as 1933 or 1934 that he owed that for."

We submit that the attempt of Goldie to show that he had a substantial adverse claim was without merit, and that the court should hold that the Referee has summary jurisdiction in this matter.

> *May v. Henderson,* 268 U. S. 111, at 115 and 116; 45 S. Ct. 456, at 458:
>
> "Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the prin-

ciples of decision here stated (citing cases). *It may disregard the assertion that the claim is adverse if on the undisputed facts it appears to be merely colorable.*"

See also

First National Bank of Negaunee v. Fox, 111 Fed. (2d) 810, at 813.

"It is inaccurate to say that the court in all cases lacks jurisdiction over the subject matter. The objection to summary procedure does not go to the basic jurisdiction of the court but to its authority to proceed in a summary way. The power over a bankrupt's estate, like that of any other proceeding in rem, depends primarily on actual custody. Having acquired possession of the res, it may award it to its lawful owner. However, the court's control is not limited to property of which it has actual custody through its officers, but it may also seize summarily other property said to be 'constructively' in its possession at the time the petition is filed. *This incidental power includes property in the possession of one who acknowledges he holds it subject to the bankrupt's demand or under an adverse claim which is patently absurd or made in bad faith or merely colorable.* Mueller v. Nugent, 184 U. S. 1, 18, 22 S. Ct. 269, 46 L. Ed. 405; Babbitt v. Dutcher, 216 U. S. 102, 115, 30 S. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Tauble, etc., Co. v. Fox, 264 U. S. 426, 433, 44 S. Ct. 396, 68 L. Ed. 770; May v. Henderson, 268 U. S. 111, 116, 45 S. Ct. 456, 69 L. Ed. 870.

> "The determination of jurisdiction to dispose summarily of the question of title to property to which a claim is asserted against that of the bankrupt when such jurisdiction is not consented to will depend upon the nature and validity of such claim. If the property belongs unquestionably to the bankrupt's estate, the court may take possession of it summarily. The mere assertion of an adverse claim is not enough to oust the court of its summary jurisdiction."

If the claim be unsubstantial as a matter of law, and has no basis in possession, summary jurisdiction exists.

> *Ex parte Benevolent and Protective Order of Elks,* 69 Fed. (2d) 816.

We submit that under the facts and the law, Goldie's alleged adverse claim is unsubstantial, and fails to disclose a matter of right which involves no fair and reasonable doubt and which would leave no room for controversy. Therefore the Bankruptcy Court has jurisdiction in this matter.

COMMENTS ON APPELLANT'S BRIEF.

Practically all of appellant's brief is devoted to criticism of the Referee's certificate on review and the cases cited therein. Counsel for appellant have cited only five or six cases which they contend support their position. Upon an examination of these cases we find that they are in no way controlling.

They cite only general rules—with which we have no quarrel. Great weight is laid on the case of

> *Goldstein v. Moseson* (CCA 7th Cir.), 32 A. B. R. 802; 216 Fed. 887,

and the companion case of

> *Goldstein v. Moseson* (CCA 7th Cir.), 32 A. B. R. 804; 216 Fed. 889.

Briefly, the facts in these cases are as follows:

Goldstein and Moseson were adjudicated bankrupts on an involuntary petition. Six days before the involuntary petition was filed the bankrupts transferred goods amounting to $8,375.00 to Benjamin Bros. without consideration. The trustee filed a petition for summary order against Benjamin Bros. who filed verified answers objecting to the jurisdiction, denying that they had received the goods as agents or bailees of the bankrupts, and further alleging that prior to the bankruptcy proceedings they bought and paid for the goods. Upon the hearing the Referee held that the Bankruptcy Court had summary jurisdiction to hear and determine the matter. The District Court affirmed the order of the Referee and Benjamin Bros. petitioned the Circuit Court of Appeals to review and revise the order. The appellate court reversed the order with direction to dismiss the summary proceeding, the court holding as follows:

> "As the claim of Benjamin Bros. was 'based upon a transfer antedating the bankruptcy', it belonged to the class of cases requiring a plenary suit, *unless the claim was merely colorable.*

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy."

We have no quarrel with the rule laid down by these cases. They completely support our position. In the instant case the Referee pursued the summary method and ascertained that the alleged adverse claim of Goldie was unsubstantial and obviously without color or merit, and a mere pretense (see *Harrison v. Chamberlin,* supra). Admitting for the purpose of this discussion that all of the testimony introduced, or attempted to be introduced, by Goldie was true, it would not change the unsubstantiality of Goldie's claim. He admits the execution of the agreement; that under its terms he is obligated to deliver 3,000 shares of Rainier Brewing Company Class A stock; that he is obligated to pay over to Herbert Fleishhacker the dividends on said stock; that he has already paid to Herbert Fleishhacker certain dividends, and that he owes Herbert Fleishhacker other dividends declared and paid on said stock; that at all times he admitted that he owed the dividends to Herbert Fleishhacker and would pay them over to him (Tr. pp. 30 to 33).

Also we must keep in mind that none of the cases cited by appellant supports his contention. They merely cite the general rule and hold without exception that if the claim of the one objecting to the summary jurisdiction is unsubstantial and without merit, the Bankruptcy Court has jurisdiction. In none of the cases cited by appellant did the parties ask the Bankruptcy Court to pass on the validity of a written agreement or seek any other relief which would require the court to pass on the merits.

On pp. 15, 16 and 17 of appellant's brief there was quoted a portion of the opinion in

> *In re Kornit Manufacturing Co.,* 192 Fed. 392, at 395.

We wish to call the court's attention to a portion of the opinion which is quoted on page 16 of the brief, as follows:

> "* * * as far as Graves is concerned, he not having presented any claim to the referee nor in any way submitted himself to the court's jurisdiction, were it not for the fact that *their answers go to the merits of the controversy. By doing this, respondents are estopped from questioning the court's jurisdiction over them. It is elemental law that neither at law nor in equity can a challenge to the jurisdiction be joined with a defense to the merits. When this is done, the court will disregard the objection to the jurisdiction and put the defendant to his defense.*"

This portion of the opinion is a complete answer to any contention made by appellant, to wit, when the court states that Graves could not object to the jurisdiction of the Bankruptcy Court because his answer went to the merits of the controversy, and that by doing so he was estopped from questioning the court's jurisdiction over him.

Counsel also cite

In re Midtown Contracting Co., 39 A. B. R. 578; 243 Fed. 56.

On p. 25 of their brief they quote a portion of the opinion in this case as follows:

> "The courts have held in numerous cases that a stranger to the proceedings in bankruptcy who sets up an adverse title to property which is claimed by the trustee as assets of the bankrupt, cannot be compelled to submit his claim to adjudication in a summary proceeding in the court of bankruptcy *provided his claim is made with the apparent intention of defending it in good faith, and is not merely colorable,* but is entitled to be heard in a plenary suit."

We wish to call the court's attention to the fact that this portion of the opinion sustains our contention, to wit, that a person cannot object to the summary jurisdiction of the Bankruptcy Court where his claim is merely colorable and without merit.

CONCLUSION.

In conclusion, appellee respectfully submits that since the order of the United States District Court from which the appeal is sought to be taken is an interlocutory order made in a controversy arising in proceedings in bankruptcy, the United States Circuit Court of Appeals has no jurisdiction to entertain such appeal and the same should be dismissed.

It is further respectfully submitted that in the event this court holds that it has jurisdiction to entertain such appeal, under the facts and the law as above set forth the Bankruptcy Court has jurisdiction in this matter, and therefore the order of the Referee overruling the objections of appellant to the summary jurisdiction of the Bankruptcy Court, which order was affirmed by the District Court, should not be disturbed.

Respectfully submitted.

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